

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-1020

To be argued by
GEORGE E. WILSON

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-1020

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANCISCO G. BACALLAO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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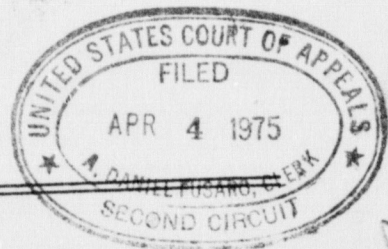


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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Francisco G. Bacallao appeals from a judgment of conviction entered on January 14, 1975 in the United States District Court for the Southern District of New York, after a three day trial before the Honorable Kevin T. Duffy, United States District Judge, and a jury.

Indictment 73 Cr. 883 filed on September 21, 1973 charged Bacallao and two others* with violations of the federal narcotics laws.

Count One charged Bacallao, Rivera and Sanchez Rodriguez with conspiring with others to violate the Federal narcotics laws in violation of Title 21, United States Code,

* Edgardo Rivera and Hugo Sanchez Rodriguez were also indicted in 73 Cr. 883. Each pled guilty to Count One of the indictment (conspiracy count) on December 9, 1974.

Section 846. Count Two charged Bacallao and his co-defendants with possession approximate 109.99 grams of cocaine hydrochloride with intent to distribute, on September 13, 1973. Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

Trial commenced on December 9, 1974. On December 11, 1974 Bacallao was found guilty as charged.

On January 14, 1975 Bacallao was sentenced to a term of four years imprisonment to be followed by three years special parole. He is presently serving his sentence.

Statement of Facts

The Government's Case

William Simpson, a special agent with the Drug Enforcement Administration was assigned to work with Romero, a confidential informant, in locating dealers in heroin and cocaine. On September 10, 1973 Romero advised Simpson that he had found some individuals who were dealing in cocaine (Tr. 15).^{*} Acting in an undercover role as a potential purchaser of cocaine, Simpson went with Romero to meet the individuals. On September 10, 1973 they met Hugo Sanchez Rodriguez, Edgardo Rivera and Bacallao at 181st Street and Grand Concourse in the Bronx (Tr. 17). Negotiations ensued concerning the purchase of one-quarter kilogram of cocaine. Sanchez conversed with Bacallao in Spanish and then spoke to Simpson in English. Simpson was told that they had just received a large shipment of cocaine and were in the process of cutting it and would return at 10:00 P.M. (Tr. 20). Simpson said he would only wait until 8:30 and it was agreed that that they would return by that time with

^{*} Reference to "Tr." are to the transcript; "GX" are the Government exhibits.

the cocaine. A price of \$5,000 was agreed upon (Tr. 21). No one having appeared by 8:45, Simpson left empty-handed (Tr. 20).

The next day, September 11th, Simpson and Romero met Rivera at the same place. Rivera said that he would stop by Sanchez's home and advise him to bring the package. After an hour of fruitless waiting Simpson and Romero left. (Tr. 22).

On September 13th Simpson and Romero met Rivera at 181st Street and Grand Concourse. Rivera said that his friends were waiting in his apartment with the one-quarter kilogram of cocaine. Simpson refused to go to the apartment, insisting that the sale takes place in the street. It was then agreed that Romero would go with Rivera to see the package and Simpson would wait on the street with the money (Tr. 24). Romero and Rivera left. Simpson waited until instructed to leave the area (Tr. 25).

On September 13th, Special Agent Robert Grant* and other agents were on surveillance duty in the vicinity of Burnside Avenue and the Grand Concourse in the Bronx (Tr. 49). Grant saw Romero walk to 2390 Tiebout Avenue, which he subsequently learned was where Rivera lived in apartment 1B. Grant observed Rivera and Romero meet Sanchez and Bacallao outside. At the time Bacallao and Sanchez arrived, Bacallao removed a brown paper bag from the trunk of his car. They then all went into the building (Tr. 50). Thereafter, Romero left the building, and Grant

* Grant was Simpson's supervisor in 1973. He assigned Simpson his undercover role with Rivera. He and six or seven other agents conducted surveillance of the September 10th meeting and witnessed the meeting between Simpson and Rivera, Sanchez, and Bacallao (Tr. 43-45). Grant also conducted a surveillance of the September 11th meeting between Simpson and Rivera (Tr. 46-47).

and other agents went in and arrested Bacallao, as he answered the door, and Sanchez and Rivera. (Tr. 62) At the time of his arraignment the next day Bacallao said he had been making plumbing repairs in the apartment, but Grant never saw the tools. (Tr. 65)

Robert Palumbo, a special agent with the Drug Enforcement Administration was assigned to surveillance duty at 2390 Tiebout Avenue in the Bronx on September 13, 1973. He observed Rivera and Romero enter 2390 Tiebout Avenue. At approximately 8:00 P.M. he and Special Agent Paul Buceti were assigned to watch the alleyway between 2390 and the next building. They took up a surveillance of three or four windows on the south side of 2390. (Tr. 78) Palumbo could hear the arresting officers announcing themselves. "Federal agents—you are under arrest—Freeze". At that point he heard something hit the branch of a tree. He ran under the tree and caught a brown paper bag as it fell from the tree (Tr. 79; GX 2B). Inside the bag was a glassine envelope containing white powder (GX 2A). Palumbo then sealed it in a plastic envelope (Tr. 81; GX 2).

Paul Buceti, a special agent with the Drug Enforcement Administration, was assigned to surveillance with Palumbo on September 13, 1973 (Tr. 84). At the time of the arrest inside the building Buceti saw a hand throwing a bag, which he identified as GX 2B, out of the window (Tr. 85). Agent Palumbo caught the bag. Subsequently Buceti identified the window as belonging to Rivera's apartment (Tr. 80).

Hugo Sanchez Rodriguez had known Bacallao for about a year prior to the arrest. About two months before the arrest Bacallao asked Sanchez if he knew of anybody that wanted to buy some cocaine. Bacallao said he would pay for furnishing him customers (Tr. 91). About two weeks before the arrest, Edgardo Rivera, his wife's cousin, asked Rodriguez if he knew somebody that had cocaine. Rod-

riguez said that he did. Rivera said that he thought he had somebody that wanted cocaine (Tr. 93).

On September 7, 1973 Rivera introduced Rodriguez to Romero. A meeting was set up for the following day. In the meantime Rodriguez visited Bacallao and asked him what the price would be for an eighth of cocaine. Bacallao responded that it would cost \$2800 or \$2900. (Tr. 94). Bacallao promised Rodriguez and Rivera each \$100 for bringing a customer to him (Tr. 95). The next day Rodriguez and Rivera met with Romero and told him the price. On September 10th Rodriguez, Rivera and Bacallao met Romero and Simpson at Burnside Avenue and the Grand Concourse in the Bronx. Simpson inquired about cocaine and was told by Bacallao (with Rodriguez translating) that the cocaine has arrived but it had to be cut and would be ready later (Tr. 97). It was agreed that they would return an hour and a half later with the cocaine. Rodriguez then went with Bacallao to the latter's connection, a woman named "La Jefe", to obtain an eighth of cocaine. However, they were unable to locate "La Jefe" that night (Tr. 100).

Rodriguez so advised Rivera who arranged another meeting for the following day. While Simpson and Romero were waiting at Burnside Avenue on September 11 Rodriguez unsuccessfully attempted to contact Bacallao (Tr. 102).

On September 13, 1973 Rodriguez saw Bacallao around 5:00 or 5:30 P.M. After learning that Bacallao could get the cocaine, Rodriguez contacted Rivera who set up another meeting with Romero and Simpson for about 7:30 or 8:00 P.M. at Rivera's apartment at 2390 Tiebout Avenue (Tr. 103). In the meantime Bacallao and Rodriguez contacted "La Jefe" and arrangements were made for her to deliver the cocaine at Bacallao's apartment. Later "La Jefe" arrived and gave Bacallao the cocaine which Rodriguez identified as (GX 2A & 2B; Tr. 105). Bacallao and Rodriguez then went in Bacallao's car to meet Rivera at

his apartment. (Tr. 106). Upon arriving Bacallao placed the eighth of cocaine which was on the seat of the car in his coat pocket. They got out of the car, and Bacallao removed a bag full of tools from the trunk, explaining that if someone came around he would say he was doing some plumbing repairs (Tr. 107). Bacallao, Rodriguez, Romero and Rivera entered Rivera's apartment. Inside Bacallao took out the eighth of cocaine and displayed it to Romero, who, after sampling it, announced that he would go out and get the money. After Romero left Bacallao gave the eighth to Rivera and told him to wait by the window just in case somebody attempted to rob them (Tr. 108-109). Bacallao told Rivera to flip the package out of the window if he gave him the word. About 10 to 15 minutes later Bacallao answered the door, agents rushed in, and Rivera dropped the bag out the window.

Edgardo Rivera testified that he discussed cocaine with Rodriguez prior to September, 1973, and was told that if buyers were found that would be a profit in it. (Tr. 141). He met Romero and discussed the sale of cocaine, later contacting Rodriguez to ask him if he could still obtain cocaine. Having been assured that Rodriguez could, Rivera set up a meeting with Romero for September 7, 1973 (Tr. 143). At that meeting Rivera and Rodriguez discussed the sale of cocaine with Romero.

On September 10, 1973 Rivera, Rodriguez and Bacallao met with Romero and Simpson (Tr. 144-145). Rodriguez served as interpreter for Bacallao, who discussed prices and amounts of cocaine with Simpson (Tr. 147). The sale did not occur as planned until September 13th. On September 13th Rivera met Romero and Simpson at Burnside and Grand Concourse. The sale was to take place at Rivera's apartment. Simpson refused to go because he was afraid he would be robbed. Therefore it was agreed that Romero would go and Simpson would wait at Burnside Avenue and the Grand Concourse (Tr. 148). Rivera and Romero then

went to Rivera's apartment. As they were returning from purchasing beer they met Bacallao and Rodriguez, who were arriving in Bacallao's car. Inside Bacallao took out the cocaine and displayed it to Romero who sampled it and said he would get the money. While they were waiting they became suspicious. Bacallao put the cocaine back into the bag, and Rivera took it to the window to throw it out in case they were to be robbed. Later Romero knocked on the door. There was a lot of noise and Rivera, frightened, threw the bag out of the window (Tr. 152-153). Although Rivera had asked Bacallao to fix the plumbing, he testified that Bacallao did not offer to do so on September 13th (Tr. 154, 175).

It was stipulated (GX 1) that the white substance contained in GX 2A was found on chemical analysis to weigh approximately 109.99 grams of which 8.8 percent was cocaine hydrochloride, the remainder being an adulterant.

The Defense Case

Francisco G. Bacallao, the defendant testified that he first met Rodriguez five or six months prior to September, 1973 and that he also knew Rivera from the neighborhood (Tr. 195). He denied having any knowledge of a conspiracy between himself, Rodriguez and Rivera to sell cocaine. He specifically denied speaking to Rodriguez about cocaine or telling him he would pay for customers; denied talking to Simpson; and denied any knowledge of a person named "La Jefe" (Tr. 205-209). He also denied any knowledge of what Rivera and Rodriguez were doing on September 13, 1973 with regard to the cocaine (Tr. 196). He denied ever even hearing either Rivera or Rodriguez talk about cocaine and claimed he had gone to Rivera's apartment to fix some plumbing (Tr. 214). He had with him an extension light, pliers, screwdriver, and a hammer. (Tr. 216) As he was having a beer somebody knocked on the door; he opened it and was handcuffed (Tr. 197). He denied taking any cocaine into the apart-

ment but admitted bringing tools which were left in the apartment (Tr. 198-199). Bacallao testified that he had told the same story to the Assistant United States Attorney who had questioned him prior to his arraignment (Tr. 204-205).

ARGUMENT

The Evidence of Guilt Was Overwhelming.

Bacallao contends that there was insufficient evidence to justify a finding of guilt. The argument is frivolous.

The only issue raised on appeal is the credibility of the government witnesses. Bacallao had promised Rodriguez and Rivera money for finding him customers. They found him a customer who, unfortunately for them, happened to be a federal narcotics undercover agent. Their testimony is amply corroborated in its material respects by that of Agents Simpson, Grant, Buceti and Palumbo. The issue was solely one of credibility for the jury and is not subject to reargument on appeal. *United States v. Koss*, 506 F.2d 1103, 1110-1111 (2d Cir. 1974); *United States v. Mallah*, 1503 F.2d 971, 981 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3515 (March 24, 1975); *United States v. McGuire*, 381 F.2d 306, 315 (2d Cir. 1967), *cert. denied*, 389 U.S. 1053 (1968); *United States v. Brown*, 335 F.2d 170, 172 (2d Cir. 1964). The claimed inconsistencies in testimony on which Bacallao places such emphasis were properly left to the jury, which resolved them against him. *United States v. Ortega-Alvarez*, 506 F.2d 455, 457 (2d Cir. 1974); *United States v. Zanfardino*, 496 F.2d 887 (2d Cir. 1974). The verdict of the jury must be sustained since, viewed in the light most favorable to the Government, the evidence in its totality was more than sufficient to support it. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Mingoia*, 424 F.2d 710, 712 (2d Cir. 1970); *United States v. Kahaner*, 317 F.2d 459, 467 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Southern District of New York,
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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Alice Prokajila being duly sworn,
deposes and says that she is employed in the office of the
United States Attorney for the Southern District of New York.

That on the *4th* day of *April* 1975
she served a copy of the within
by placing the same in a properly postpaid franked envelope
addressed:

Allen Stim, Esq.
29 Broadway
New York, N.Y.

And deponent further says that she sealed the said envelope
and placed the same in the mail drop for mailing
the United States Courthouse, Foley Square,
Borough of Manhattan, City of New York.

Alice Prokajila

Sworn to before me this

4th day of *April* 1975
Lynwood Hayes

LYNWOOD HAYES
Notary Public, State of New York
No. 41-1720825
Qualified in Queens County
Cert. filed in New York County
Commission Expires March 30, 1977